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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY SACRAMENTO
11

12 FAIR POLITICAL PRACTICES COMMISSION,)
a state agency,)
13)
Plaintiff,)
14)
vs.)
15)
DEMOCRATIC NATIONAL COMMITTEE NON-)
16 FEDERAL—CORPORATE, ANDREW TOBIAS,)
CAROL PENSKY,)
17)
Defendants.)

Case No. 05AS00822

(~~PROPOSED~~) ORDER SUSTAINING
FPPC'S DEMURRER TO DNC'S
CROSS-COMPLAINT WITHOUT
LEAVE TO AMEND; JUDGMENT OF
DISMISSAL

Hearing Date: June 23, 2005
Time: 9:00 a.m.
Department: 54
Hearing Judge: Thomas M. Cecil
Action Filed: February 25, 2005

19)
DEMOCRATIC NATIONAL COMMITTEE NON-)
20 FEDERAL—CORPORATE, ANDREW TOBIAS,)
CAROL PENSKY,)
21)

Trial Date: NO TRIAL DATE SET

22 Cross-complainants and Defendants,)
23)
vs.)
24)
FAIR POLITICAL PRACTICES COMMISSION,)
a state agency,)
25)
Cross-Defendant and Plaintiff,)
26)

27 This matter came on regularly for hearing on June 23, 2005, before Honorable Thomas M. Cecil,
28 Judge Presiding, in Department 54 of the above-entitled Court, with appearance by counsel as follows:

1 Senior Commission Counsel Julia Bilaver appeared for Plaintiff and Cross-defendant Fair Political
2 Practices Commission (“FPPC”), and Deborah Caplan and Richard Miadich of Olson, Hagel & Fishburn
3 appeared for Defendants and Cross-plaintiffs Democratic National Committee, Non-federal—Corporate,
4 Andrew Tobias, and Carol Pensky (collectively “DNC”).

5 After reviewing the pleadings, files, and exhibits submitted, as well as the arguments made at the
6 hearing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT THE DEMURRER
7 FILED BY CROSS-DEFENDANT FPPC TO THE CROSS-COMPLAINT FILED BY CROSS-
8 PLAINTIFF DNC IS SUSTAINED WITHOUT LEAVE TO AMEND for the following reasons:

9 DNC alleges that California Code of Regulations, title 2, section 18361.8, which states that
10 Government Code section 83115.5¹ applies only to administrative hearings conducted under section
11 83116, is contrary to law and unenforceable. Section 83115.5 requires a 21-day notice and an
12 opportunity to be heard before the FPPC may find probable cause that a person has violated the Political
13 Reform Act (the “Act”).² The FPPC filed a civil action under section 91004 without providing DNC the
14 21-day notice and opportunity to be heard as provided by section 83115.5. DNC seeks injunctive and
15 declaratory relief. The court may decide this matter of law at the demurrer stage of the proceedings.

16 The FPPC argues that section 83115.5 was added to Chapter 3 of the Act in 1977 to clarify
17 procedures in making a probable cause determination, which may result, under section 83116, in an
18 administrative hearing and a penalty not to exceed \$5,000. The later section has been in effect since
19 1975. Section 91004, found in Chapter 11³ of the Act and also effective in 1975, states that “the civil
20 prosecutor” or “a person” may bring a civil action to enforce the Act. The FPPC is one of several civil
21 prosecutors. (Section 91001.) According to the FPPC, the two remedies are separate and distinct. The
22 DNC does not dispute that the FPPC may bring a civil action under section 91004. The DNC contends,
23 however, that the FPPC’s options of either an administrative hearing or a civil action are cut from the
24 same cloth and the procedures in section 83115.5 apply to both. The FPPC has the better argument.

26 ¹ All statutory references are to the Government Code unless otherwise specified.

27 ² The Political Reform Act is codified at Government Code sections 81000 through 91014.

28 ³ The tentative ruling inadvertently identified the civil remedies chapter of the Act as “Chapter 9.” However, Chapter 11 is the civil remedies chapter.

1 On its face, the “finding of probable cause” mentioned in section 83115.5 applies to “probable
2 cause” necessary for the administrative hearing that the FPPC may hold under section 83116. There is
3 no comparable language or requirement in section 91004. There is a reason for this. As the DNC points
4 out, the administrative action under section 83116 is “essentially [a] ‘strict liability’ proceeding,” which
5 justifies additional protection to suspected violators. After all, unlike a civil action under section 91004,
6 it is the FPPC itself, not a court of law, which “determines [whether] a violation has occurred.” (Section
7 83116.) Further, the FPPC is not the only “civil prosecutor” that may bring a civil action under section
8 91004. Indeed, any “person residing within the jurisdiction” may bring such an action. The court sees
9 no justification for imposing the notice and opportunity to be heard requirement in section 83115.5 on
10 the FPPC, or any other plaintiff, e.g., the attorney general or district attorney. Moreover, because
11 section 83115.5 was enacted two years after both sections 83116 and 91004, it would have been a
12 simple matter for the Legislature to specify that the new requirements applied to both administrative and
13 civil actions. The Legislature didn’t do that; instead, it deliberately placed the statute in front of section
14 83116 and added nothing in Chapter 11. Where the Legislature intended a notice requirement to apply
15 to both types of proceedings, it knew how to do so. (See, e.g., sections 83115 and 91007, subd. (a).)
16 Finally, DNC’s due process contentions are unpersuasive. The DNC enjoys the same protections as any
17 other defendant in a civil action. At least in this court, “arbitrary adjudicative procedures” are not
18 employed. (*People v. Ramirez* (1979) 15 Cal.3d 260, 268.) And, again, the court sees no reason why
19 the DNC should benefit from additional notice just because the FPPC, rather than, say, the attorney
20 general, brings a civil action.

21 The cross-complaint is hereby dismissed. Let judgment be entered accordingly. This judgment
22 shall take effect immediately upon entry. The clerk is directed to enter this final judgment forthwith.

23
24 Dated: _____

Judge, Superior Court

25
26 Approved as to form:

27 Dated: _____

Deborah Caplan, Olson, Hagel & Fishburn